INTERIOR BOARD OF INDIAN APPEALS

Estate of Norman Steele (Steal)

31 IBIA 12 (05/12/1997)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ARLINGTON, VA 22203

ESTATE OF NORMAN STEELE (STEAL)	: Order Vacating Order on Reopening and Remanding Case
	: Docket No. IBIA 96-77
	: May 12, 1997

This is an appeal from an April 19, 1996, order issued by Administrative Law Judge Vernon J. Rausch, reopening the estate of Norman Steele (Steal) (decedent) in order to add Brenda Kay Brown Nelson Haugen as a child and heir of decedent. Appellants are Salina Steele, Paulette Steele, and Robert Steele, children of decedent. For the reasons discussed below, the Board vacates Judge Rausch's order and remands this matter to him for further consideration.

Decedent, Standing Rock Sioux 302-U07770, died on December 28, 1973. In an order issued on September 20, 1974, Administrative Law Judge Garry V. Fisher determined that decedent's heirs were his widow, Edna Kills Pretty Enemy, and five children, Stacey Steele, David Steele, and Appellants.

On August 22, 1994, Haugen wrote to the Superintendent, Standing Rock Agency, Bureau of Indian Affairs, stating that decedent was her father and requesting that his estate be reopened so that she could be added as an heir. The Superintendent forwarded the request to Judge Rausch. After obtaining further information concerning Haugen's claim, Judge Rausch, on July 11, 1995, issued a Notice to Show Cause, giving interested parties an opportunity to object to Haugen's claim. Appellants filed an objection.

Judge Rausch did not hold a hearing on Haugen's petition for reopening. Instead, he based his decision on the written record. In his April 19, 1996, order, he found that Appellants' objection had been answered and refuted by Haugen. He further found that the evidence presented was sufficient to establish that Haugen was the natural child of decedent. Therefore, he issued a redetermination of decedent's heirs and included Haugen as an heir.

Appellants challenge, inter alia, Judge Rausch's conclusion that Haugen is decedent's natural child. Judge Rausch's order did not identify the evidence he relied upon in reaching his conclusion. However, given the lack of other evidence of paternity in the record, it seems likely that he gave significant weight to a January 1, 1994, affidavit from Haugen's mother, Edna Marie Brown (a.k.a. Edna Kills Pretty Enemy), stating that decedent was Haugen's father. Brown, however, gave contradictory testimony at decedent's 1974 probate hearing, where she stated (Tr. at 3) that she

and decedent had only two children together, Stacey and David. At the least, this conflicting testimony, in both cases given under oath, raises a question as to this witness's credibility. Although he did not discuss the issue of credibility, Judge Rausch implicitly found Brown's 1994 affidavit credible, despite her earlier testimony.

The Board normally does not disturb a decision based on findings of credibility where the Administrative Law Judge has had an opportunity to hear the witnesses and to observe their demeanor. E.g., Estate of Donald Paul Lafferty, 19 IBIA 90, 93 (1990). However, the Board has held that it will review determinations of credibility de novo in an instance where a decision in a probate case is issued by an Administrative Law Judge other than the one who conducted the hearing. Estate of Emerson Eckiwaudah, 27 IBIA 245, 251 (1995). In this case, because no hearing was held, no Judge had an opportunity to observe Brown's demeanor. The Board may therefore review de novo Judge Rausch's implicit finding concerning Brown's credibility. However, in light of the conclusions discussed below, the Board finds it unnecessary to do so at this point.

The fact that no hearing was held meant, not only that Judge Rausch had no opportunity to observe Brown but, even more significantly, that Appellants had no opportunity to cross-examine her. In a case where so much of the petitioner's claim was based upon the testimony of one witness, and that witness's credibility was open to question, it was a violation of Appellants' right to due process not to give them an opportunity to cross-examine the witness.

The Board finds that Judge Rausch erred in finding Haugen to be decedent's child without holding a hearing at which Brown, and any other knowledgeable witnesses, could be called to testify, to be cross-examined by Appellants, and to be observed by the Judge.

Apart from these procedural problems, the Board finds Judge Rausch's conclusion concerning Haugen's paternity questionable under Eckiwaudah, because there is virtually nothing in the record to support Brown's 1994 statement. In Eckiwaudah, the Board stated:

> [A]bsent strong extenuating circumstances, * * * a mother's testimony by itself is not sufficient to prove paternity by a preponderance of the evidence when no action consistent with the allegation of paternity has been taken during the putative father's lifetime beyond the mother's naming the putative father at the hospital and/or to the child.

27 IBIA at 252.

For all these reasons, the Board finds that Judge Rausch's conclusion concerning Haugen's paternity must be vacated.

There are further problems with the April 19, 1996, order. Judge Rausch did not discuss the question of whether Haugen exercised due dili-

gence in pursuing her claim. Nor did he discuss the fact that she had been adopted as an infant. Both of these considerations are critical here. 1/

The Board has discussed the due diligence requirement on several occasions, most recently in Estate of George Dragswolf, Jr. (Dragswolf II), 30 IBIA 188 (1997), and more extensively in Estate of George Dragswolf, Jr. (Dragswolf I), 17 IBIA 10 (1988), and Estate of Woody Albert, 14 IBIA 223 (1986). In Dragswolf II, the Board summarized:

> The Department has a well-established requirement that a petitioner for reopening exercise due diligence in pursuing his/her claim. As it was put in Dragswolf I, "[b]ecause of the substantial interest of Indian heirs in the finality of Indian probate decisions affecting their property rights, it is equitable to require a claimant to act on his rights within a reasonable time after he knows or should know of them." 17 IBIA at 12.

30 IBIA at 196.

Haugen has made seemingly inconsistent statements concerning the length of time she has had information that decedent was her father. In an August 26, 1995, response to Appellants' objection, Haugen suggested that she did not have information about her natural father's identity until sometime after 1990. 2/ In her brief before the Board, however, Haugen states that "[s]he has always known that [decedent] and Edna Brown were her natural mother and father." Haugen's Brief at l. Clearly, the statement in her brief is at odds with the suggestion in her August 26, 1995, response. Further, if Haugen truly has "always" known that decedent was her father, there is a serious question as to whether she exercised due diligence in pursuing her claim.

Perhaps even more significant here is the fact that Haugen was adopted. Under 25 U.S.C. § 348, when an Indian owning trust or restricted property dies intestate, the property passes in accordance with the laws of intestate succession of the state in which the property is located. Accordingly, the right of an adopted child to inherit trust property located in that state is determined in accordance with those same state laws. See, e.g., Estate of Victor Blackeagle, 16 IBIA 100 (1988).

Decedent died intestate owning trust property in North Dakota and South Dakota. Therefore, North Dakota and South Dakota law must be used to deter-

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1/ For purposes of the following discussion only, the Board assumes that Haugen is, and would be able to establish that she is, the natural child of decedent.

2/ Haugen's Aug. 26, 1995, response is imprecise on this point. Further, it is not signed, let alone given under oath.

The Board observes that, even though Brown's affidavit is dated Jan. 1, 1994, Haugen did not request reopening until Aug. 22, 1994.

mine whether decedent's natural child, who has been adopted by others, can inherit from decedent. 3/

According to materials furnished by Judge Rausch in Dragswolf II, North Dakota law, prior to 1971, permitted adopted persons to inherit from their natural parents. These materials also show that the law was changed in 1971 to preclude adopted persons from inheriting from their natural parents. See Dragswolf II, 30 IBIA at 193-94. Decedent died in 1973, after the law was changed. Although no copy of Haugen's adoption decree is included in the record, it appears likely from other documents in the record that she was adopted prior to 1971. Thus, the question of whether Haugen could inherit any of decedent's North Dakota property depends upon which law controls))the law in effect at the time of decedent's death or the law in effect at the time of Haugen's adoption. Although it is apparently the case that most jurisdictions apply the law in effect at the time of the decedent's death, 2 Am. Jur. 2d Adoption § 197 (1994); 2 C.J.S. Adoption of Persons § 150 (1972), 4/ the North Dakota law on this point is not immediately apparent from the materials presently before the Board.

Thus, one determination that must be made in this case is whether the 1971 North Dakota statute, which is codified at N.D. Cent. Code § 14-15-14 (1981), applies here. Further, for purposes of deciding whether Haugen is entitled to inherit decedent's property in South Dakota, a determination must be made as to the applicable South Dakota law.

Upon remand of this case, Judge Rausch shall first determine whether, as a matter of law, a natural child of decedent, in Haugen's circumstances, could inherit from decedent under North Dakota and South Dakota law. If he determines that such a child would be entitled to inherit any of decedent's property under the law of either of those states, he shall then conduct a hearing for the purpose of taking evidence concerning Haugen's paternity and her due diligence in pursuing her claim.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Judge Rausch's April 19, 1996, order is vacated and this matter is remanded to him for further consideration as discussed in this order.

//original signed	//original signed
Anita Vogt	Kathryn A. Lynn
Administrative Judge	Chief Administrative Judge

3/ In 1980, Congress enacted a statute governing inheritance of trust or restricted land on the Standing Rock Reservation, which is located in both North Dakota and South Dakota. Act of June 17, 1980, Pub. L. No. 96-274, 94 Stat. 537. Section 5 of that statute settles any question that might arise concerning the statute's application to decedent's estate. It provides: "The provisions of this Act shall apply only to estates of decedents whose deaths occur on or after the date of enactment of this Act."

4/ Cf., Annotation, What law, in point of time, governs as to inheritance from or through adoptive parent, 18 A.L.R.2d 960 (1951).